IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL WRIT PETITION NO.1584 OF 2002

Haroon Ahmed Merchant
of Mumbai, Indian Inhabitant
residing at Room No.28-31,
6th and 7th Floor, White
House, 53/57 Narayan Dhuru
Street, Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Shri B.R. Patil, Addl. Public Prosecutor, for the Respondent-State.

WITH

CRIMINAL WRIT PETITION NO.1585 OF 2002

1. Mrs. Amina Ahmed Umar Dossa

2. Haroon Ahmed Merchant

3. Sabira Salim Memon

4. Yasmin Hanif Landa

being the heirs & legal repre-
sentatives of Ahmed Umar Dossa,
all of Mumbai, Indian
Inhabitant, residing at
5/6th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioners

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioners.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Shri B.R. Patil, Addl. Public Prosecutor, for the Respondent-State.

CRIMINAL WRIT PETITION NO.1586 OF 2002

Yasmin Hanif Landa
of Mumbai, Indian
Inhabitant, residing at
5/6th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA

having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor, for the Respondent-State.

CRIMINAL WRIT PETITION NO.1587 OF 2002

Abida Mohd. Ahmed Dossa
of Mumbai, Indian Inhabitant,
residing at R.Nos.28-31, 6th
& 7th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor, for the Respondent-State.

CRIMINAL WRIT PETITION NO.1588 OF 2002

Sabira Salim Memon
of Mumbai, Indian Inhabitant,
residing at R.Nos.28-31, 6th
& 7th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav
& Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and
2.

Shri I.S. Thakur, Addl. Public Prosecutor,
for the Respondent-State.

CRIMINAL WRIT PETITION NO.1589 OF 2002

Mustafa Ahmed Dossa
of Mumbai, Indian
Inhabitant, residing at
5/6th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Shri B.H. Mehta, Addl. Public Prosecutor, for the Respondent-State.

CRIMINAL WRIT PETITION NO.1590 OF 2002

Amina Ahmed Dossa
of Mumbai Indian Inhabitant
residing at Room No.5/6 floor
White House, 53/57, Narayan
Dhuru Street, Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Ms P.H. Kantharia, Addl. Public Prosecutor,

for the Respondent-State.

CRIMINAL WRIT PETITION NO.1591 OF 2002

Safia Mustafa Dossa
of Mumbai, Indian
Inhabitant, residing at
5/6th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Ms U.V. Kejriwal, Addl. Public Prosecutor, for the Respondent-State.

AND

CRIMINAL WRIT PETITION NO.1592 OF 2002

Rehmat Haroon Merchant
of Mumbai, Indian
Inhabitant, residing at
5/6th Floor, White House,
53/57 Narayan Dhuru Street,
Mumbai-400 003. .... Petitioner

- Versus -

1. Union of India
through Government Pleader
Aaykar Bhavan, New Marine
Lines, Mumbai-400 020.

2. The Competent Authority
under the SAFEMA
having its office at
"C" Wing, Mittal Court,
3rd Floor, Nariman Point,
Mumbai-400 021.

3. State of Maharashtra .... Respondents

Shri P.K. Dhakephalkar i/b M/s. S.K. Srivastav & Co. for the Petitioner.

Shri R.F. Lambay for the Respondent Nos.1 and 2.

Ms V.R. Bhonsale, Addl. Public Prosecutor, for the Respondent-State.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: APRIL 06, 2005

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Since common questions of law and facts arise in all these petitions, they were heard together and are being disposed of by this common Judgment.

2. In all these petitions, the petitioners challenge the order issued under Section 7 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, hereinafter called as "the SAFEMA" on various grounds. However, it is not necessary to deal with all those grounds and suffice to refer to only one ground

which relates to serious breach of the procedure in the matter of disposal of the proceedings by the Appellate Authority while disposing the appeals filed by the petitioners against the declaration of forfeiture of their properties issued under Section 7 of the SAFEMA, resulting in miscarriage of justice and consequently vitiating the ultimate decision arrived at.

3. Few facts relevant for the decision are that the show cause notices in terms of the provisions of Section 6 of the SAFEMA came to be issued in May, 1995 and the declaration under Section 7 regarding the forfeiture of the properties of the petitioners came to be issued on 29-2-2000. The petitioners preferred appeals to the Appellate Tribunal against the declaration of the forfeiture of their properties. The appeals were filed in terms of Section 12 of the SAFEMA. The Tribunal at the relevant time was constituted of three members, including the chairman and they were Shri Justice Eshwara Prasad (Retd.), Chairman, and Smt. Kamlesh Shukla and Shri Devendra Narain, Members. Smt. Kamlesh Shukla having retired, the appeals came to be heard on 7-2-2001 by the Chairman Shri Justice Eshwara Prasad and the Member Shri Devendra Narain. After hearing the appeals, the same were reserved for judgment. In the course of preparation of the judgment, the Appellate Authority consisting of the Chairman Shri Justice

Eshwara Prasad and the Member Shri Devendra Narain considered it appropriate to get certain clarifications as well as to order the joinder of the Union of India as party to the proceedings since the declaration of forfeiture of the properties was essentially in favour of the Union of India. Accordingly, the Appellate Authority consisting of the Chairman Shri Justice Eshwara Prasad and the Member Shri Devendra Narain passed the order dated 24-7-2001 directing impleadment of the Union of India as party-respondent to the appeals and the notices were issued to the Union of India being returnable on 16-10-2001. On 16-10-2001 an officer on behalf of the Union of India requested for further time to make submissions which was granted and the matters were adjourned to 28-11-2001, on which day Shri Harish Chandra, Senior Advocate, appeared for the Union of India. The Senior Advocate on behalf of the Union of India submitted before the Appellate Tribunal that he required the copies of all the documents and further time to study the documents and only thereafter he would be able to make his submissions. Accordingly, the time was granted and the competent authority was directed to furnish him the copies of all the documents. Thereafter, on 25-6-2002 Shri Harish Chandra made his submissions in the matters and after hearing the Advocate for the appellants in that regard, the matters were adjourned for the judgment and accordingly the

judgment was delivered on 19-9-2002. As far as the hearing on 25-6-2002 is concerned, the same was heard by three Members as by that time the second Member of the Appellate Authority was also appointed and he was Shri A.M. Prasad. The judgment was delivered by the Chairman and both the Members of the Appellate Tribunal.

4. While assailing the impugned judgments of the Appellate Authority, the learned Advocate for the petitioners submitted that the matter before the Appellate Authority was fully heard on 5th, 6th and 7th of February, 2001 when the Appellate Authority comprised of only two Members, namely, the Chairman Shri Justice Eshwara Prasad and Member Devendra Narain. Thereafter, in the course of preparation of the judgment, the said Appellate Authority thought it appropriate to seek certain clarifications in the matter as well as to order the joinder of the Union of India as the party respondent and accordingly passed the order to that effect on 24-7-2001. After the joinder of the Union of India as the party respondent, undoubtedly the matter was heard but the hearing was restricted to the extent as to whether the joinder of the Union of India was necessary and appropriate in the matter and the hearing did not relate to the merits of the case. The Advocate for the Union of India having been heard merely on the point of necessity of the Union of India as the party

respondent to the proceedings and there being no hearing on the merits of the case before the Appellate Authority consisting of three Members, namely, the Chairman Shri Eshwara Prasad, Member Shri Devendra Narain and the third Member who was subsequently appointed, namely, Shri A.M. Prasad, the judgment on merits could not have been delivered by all the three Members. In other words, the judgment on merits has been delivered by all the three Members while the matter was heard on merits by two Members only. This apparently discloses serious breach of procedure on the part of the Appellate Authority in the matter of disposal of the appeals and being contrary to the basic principles of natural justice. The impugned judgment is, therefore, liable to be set aside and the matter remanded to the Appellate Authority, to be heard and disposed of afresh in accordance with the provisions of law. The learned Advocate appearing for the respondent-Union of India, on the other hand, submitted that the matters were fully heard after the appointment of the third Member when it came up for hearing on 25-6-2002 and being so, the challenge to the impugned judgment on the ground of disposal of the appeals by three Members, when the matters were heard by only two Members, is devoid of substance. According to the learned Advocate for the respondents, the fact that the matter was re-heard on 25-6-2002 in the presence of all the three Members is

apparent from the judgment itself. However, to keep the records straight a request was sought to be made that the respondents be permitted to file affidavit of the Registrar of the Appellate Tribunal in that regard.

5. Plain reading of the impugned judgment discloses that it has been categorically stated in para 17 thereof that:-

> "These appeals were heard in February 2001 and the order was reserved. During the preparation of order we found that certain clarifications were required. Therefore, on 24.7.2001 the Tribunal passed an order impleading the Union of India as a party respondent and directed that the notices be issued to the impleaded respondents as well."

The narration of the events which have occurred thereafter, as revealed from the description thereof in the impugned judgment, discloses that on 16-10-2001 which was the day of hearing following the day of 24-7-2001, the Joint Commissioner appeared for the competent authority and submitted that as per the communication received from the Ministry of Finance on 17-8-2001, the competent authority was directed to look

after the interest of the Union of India. However, the said plea was rejected by the order passed on the very day i.e. 16-10-2001 and the Union of India was expected to be represented independently and not by the competent authority. Accordingly, on 28-11-2001 Shri Harish Chandra, Senior Advocate appeared for the Union of India. He having made grievance about the non-availability of the necessary records with him, the competent authority was directed to make available to him the copies of all the relevant documents. On such copies being made available thereafter, the matter was heard on 25-6-2002. In fact, the whole controversy relates to the scope of hearing of the matter that took place on the said day i.e. 25-6-2002.

6. Plain reading of the impugned judgment by the Appellate Authority and more particularly in relation to the hearing on 25-6-2002 discloses that the hearing was only in relation to the issue pertaining to the impleadment of the Union of India as the party respondent to the proceedings. Shri Harish Chandra, the Senior Advocate does not appear to have argued on behalf of the Union of India in relation to the merits of the case. Even the reply given by Shri P.K. Dhakephalkar, the learned Advocate appearing for the petitioners, was restricted to point canvassed on behalf of the Union of India which related to the impleadment of the Union of

India as the party respondent and further submission was in relation to non-requirement of necessity of impleadment of the legal heirs of the respondent No.6 as those legal heirs were already on record. Obviously, the arguments which took place before the Appellate Authority on 25-6-2002 were restricted to the issue pertaining to the impleadment of the Union of India as the party respondent and did not relate to the merits of the case. In other words, the Appellate Authority consisting of three Members, namely, the Chairman Shri Justice Eshwara Prasad, Members Shri Devendra Narain and Shri A.M. Prasad did not hear the appeals on merit, yet in the judgment which has been delivered on 19-9-2002 by the Appellate Authority comprising of all the said three Members including the Chairman, relates to the merits of the case. This obviously discloses that though on merits the matter was heard on 7-2-2001 by only two Members of the Appellate Authority, the judgment was ultimately delivered on merits by the Appellate Authority consisting of three Members. Such a procedure for disposal of an appeal is not permissible in law, apart from being contrary to the basic principles of natural justice that in any appeal the adjudication of the rights of the parties should be by the body which has heard the appeal. Once it is apparent that the matter was heard by two persons, certainly three persons could not have pronounced the judgment in respect

thereof.

7. It is pertinent to note that the matter relates to forfeiture of the immovable property on the ground of being illegally acquired. Certainly the proceedings under Section 6 which culminates in declaration under Section 7 of the SAFEMA carry serious consequences and results in forfeiture of the immovable property belonging to the private parties and therefore the very nature of the proceedings would require strict compliance of the procedure for disposal of such proceedings. The Section 15 of the SAFEMA provides for certain powers of the Civil Court to the competent authority as well as the Appellate Tribunal and they include the procedure to be followed in relation to the recording of the evidence. The Section 24 gives over-riding effect to the provisions of the said Act. The Section 8 casts burden of proof regarding the property having been legally acquired by the person who claims so in answer to the notice received under Section 6(1) of the SAFEMA. Bearing in mind these provisions and the serious consequences which are bound to follow, it is needless to say that the authorities hearing the matter, whether the competent authority or the Appellate Authority, have not only to comply with the procedural requirement as prescribed under the Act and the Rules made thereunder but have also to follow the basic

principles of natural justice.

8. It is also pertinent to note that Rule 15 of the Appellate Tribunal for Forfeited Property (Procedure) Rules, 1986 clearly provides that the place in which the Tribunal sits for the purpose of hearing appeals shall be deemed to be an open court, to which the public generally may have access provided that the Tribunal may, if it thinks fit, order at any stage of the hearing of an appeal, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Tribunal. The Rule 16 provides that after the hearing is over, the Tribunal may pronounce its orders forthwith or it may reserve its orders and if the orders are reserved, the Tribunal may at any time before final orders are pronounced either on its own motion or on the application of a party that the appeal or petition be re-heard. The Rule 18(1) provides that when the decision of the Tribunal is unanimous, a common order shall be signed by all the members of the Tribunal. The sub-rule (2) provides where there is a difference of opinion, the decision shall be in accordance with the decision of the majority of the members of the Tribunal. The sub-rule (3) provides that a member who does not concur with the decision of the majority may deliver a dissenting order. The sub-rule (4) provides that the

decision of the majority shall be reduced in writing and signed by all the members including the dissenting member. It is well-settled law that a decision should disclose the application of mind by every member of a Tribunal who has heard the matter. These rules endorses the said principle. In other words, the hearing of the matter by every member of the Tribunal should be reflected from the judgment delivered by the Tribunal and signed by every such member who had heard the matter. This makes it mandatory for the Tribunal that the judgment has to be by the members who have heard the matter, in addition to the fact that the proceedings before the Tribunal should be in the nature of judicial proceedings like in any Court in the country. Being so, any judgment of the Appellate Tribunal which discloses that the same having been delivered by the member who has not heard the appeal cannot be sustained.

9. In the matter in hand, as already observed above, the appeals were heard on merits on 7-2-2001 by the Appellate Authority consisting of two members including the Chairman whereas the judgment has been delivered on 19-9-2002 by the Appellate Authority consisting of three members including the Chairman which itself discloses that the same is not only contrary to the provisions of law referred to above, but is also contrary to the basic principles of natural justice and on that count alone

the judgment cannot be sustained.

10. Whether the matter before the Appellate Tribunal was heard by two members or three members should be reflected either from the judgment or at least from the roznama in relation to the appeal. The fact in that regard cannot be established by any external material including in the form of an affidavit by the Registrar of the Tribunal and therefore the request by the learned Advocate for the respondent-Union of India to allow them to file the affidavit in that regard cannot be entertained at this stage and the same is rejected.

11. For the reasons stated above, therefore, the impugned judgment in all the appeals is hereby quashed and set aside and the appeals are remanded to the Appellate Tribunal with the specific direction that the same shall be disposed of after hearing the parties in accordance with the provisions of law, bearing in mind the observations hereinabove, as expeditiously as possible and in any case on or before 31-12-2005. The compliance report in that regard should be filed by the Registrar of the Appellate Tribunal in this Court in the first fortnight of January, 2006. The rule in all the petitions is made absolute accordingly with no order as to costs. Till the disposal of the appeals and for a period of three weeks thereafter from the date of

communication of the order in the appeals to the petitioners, the interim order passed in the petitions shall remain in force.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)